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16 **UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
18 **OAKLAND DIVISION**

19)
20) CAROLYN JEWEL, TASH HEPTING,
21) YOUNG BOON HICKS, as executrix of the
22) estate of GREGORY HICKS, ERIK KNUTZEN
23) and JOICE WALTON, on behalf of themselves
24) and all others similarly situated,
25)
26) Plaintiffs,
27)
28) v.
29) NATIONAL SECURITY AGENCY, *et al.*,
30)
31) Defendants.

Case No.: 4:08-cv-4373-JSW

**PLAINTIFFS' CITATIONS TO THE
RECORD IN RESPONSE TO QUESTION
NO. 1 (ECF NO. 309)**

Date: December 19, 2014
Time: 9:00 a.m.
Courtroom 5, 2nd Floor
The Honorable Jeffrey S. White

1 **b. Admissions in Government-Issued Reports**

- 2 i. ECF No. 262 (7/25/14 Wiebe Decl.), Ex. A at 7, 35–37 (Privacy and Civil Liberties
3 Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702
4 of the Foreign Intelligence Surveillance Act (“PCLOB 702 Report”) (July 2, 2014))
5 (“Once tasked, selectors used for the acquisition of upstream Internet transactions are
6 sent to a United States electronic communication service provider to acquire
7 communications that are transiting through circuits that are used to facilitate Internet
8 communications, what is referred to as the ‘Internet backbone.’”);
- 9 ii. ECF No. 174-3 at 1 (1/10/14 Rumold Decl., Ex. 3 (Joint Statement From the Office of
10 Director of National Intelligence and National Security Agency (Aug. 21, 2013) (“Aug.
11 21 Joint Statement”))) (confirming in response to media coverage that the “assistance
12 from providers . . . is the same activity that has been previously revealed as part of
13 Section 702 collection and PRISM”);
- 14 iii. ECF No. 147 (7/2/13 Wiebe Decl), Ex. A at 17 (NSA’s Working Draft Office of the
15 Inspector General Report (“Draft OIG Report”) (March 29, 2009)) (“For Internet
16 content selectors, collection managers [at NSA] sent content tasking instructions
17 directly to equipment installed at company-controlled locations.”);
- 18 iv. ECF No. 174-6 at 1 (1/10/14 Rumold Decl., Ex. 6 (Director on National Intelligence,
19 Facts on the Collection of Intelligence Pursuant to Section 702 of the Foreign
20 Intelligence Surveillance Act (June 8, 2013))) (“Service providers supply information to
21 the Government”).

22 **c. Admissions in Congressional Testimony**

- 23 i. ECF No. 172 at ¶ 3, 1:10–17 (1/10/14 Rumold Decl.) (citing description of the NSA’s
24 upstream collection process by Senator Diane Feinstein, Chair of the Senate Select
25 Committee on Intelligence, at the Hearing on FISA legislation before the S. Select
26 Comm. on Intelligence, 113th Cong. (Sep. 26, 2013): “Upstream collection . . .
27 comprises about 10 percent of all collection that takes place under 702, and occurs
28 when NSA obtains Internet communications, such as e-mails, from certain U.S.
 companies that operate the Internet backbone [sic]; i.e., the companies that own and
 operate the domestic telecommunication lines over which Internet traffic flows.”).

d. FISC Opinions

- i. ECF No. 174-1 at 26 (1/10/14 Rumold Decl., Ex. 1 (Memorandum Opinion, [name and
 docket no. redacted] (FISC Sept. 25, 2012) (“9/25/12 FISC Opinion”))) (“[T]he
 government made a series of submissions to the Court disclosing that it had materially
 misrepresented the scope of NSA’s ‘upstream collection’ under Section 702 (and prior
 authorities including the Protect America Act). The term ‘upstream collection’ refers to
 the acquisition of Internet communications as they transit the ‘internet backbone’
 facilities of [redacted] as opposed to the collection of communications directly from
 Internet service providers like [redacted] . . . For the first time, the government

1 explained that NSA’s upstream collection results in the acquisition of ‘Internet
2 transactions’ instead of discrete communications to, from or about a tasked selector.”²

3 **e. Percipient and Expert Witness Testimony of Klein, Marcus, and Russell**

4 **i. Percipient**

5 (1) ECF No. 85 and Exhibits (3/28/06 Klein Decl.);

6 (2) ECF No. 84-1 at ¶¶ 6, 10–12, 15, 19–23 (4/10/06 AT&T Managing Director-Asset
7 Protection James Russel Decl.) (authenticating statements and documents within the
8 3/28/06 Klein Decl. and the 3/29/06 Marcus Decl.).

8 **ii. Expert**

9 (a) ECF No. 89 at ¶¶ 38–147 and Exhibits (3/29/06 Marcus Decl.) (explaining (a)
10 the functionality of the equipment and technology referenced in the 3/28/06
11 Klein Decl. and (b) that there is no plausible business purpose for AT&T’s
12 surveillance configuration).

12 **f. Other Admissible Evidence**

13 i. ECF No. 262 (7/25/14 Wiebe Decl.), Ex. B at 3–4 (NSA PRISM slides) (describing
14 Upstream as “Collection of communications on fiber cables and infrastructure as data
15 flows past” and providing a chart of the types of information collected via Upstream, as
16 compared to PRISM).

16 **2) Evidence That Government Conducts Full Text Searching of Communications it Collects
17 Via Upstream (Stage 3)**

18 **a. Admissions in Declarations in This Case**

19 i. ECF No. 227 at ¶ 64, 45:6–9 (12/23/13 NSA Deputy Dir. Fleisch Classified Decl.)
20 (“For example, under the NSA’s current ‘upstream’ collection program under Section
21 702 of FISA, the NSA seeks to collect communications to, from, or about a tasked
22 selector (*e.g.*, an email address) associated with a target reasonably believed to be
23 located outside the United States.”);

24 ii. ECF No. 172-8 at ¶ 69 (9/11/12 Classified Declaration of Frances J. Fleisch (“2012
25 Fleisch Decl.”) (declassified portion of declaration showing that, in performing this type

26 ² See also Memorandum Opinion (“10/3/11 FISC Opinion”), [name and docket no. redacted], 2011
27 WL 10945618, at *2 n.3 (FISC Oct. 3, 2011) (“The term “upstream collection” refers to NSA’s
28 interception of Internet communications as they transit [redacted], [redacted], rather than to
acquisitions directly from Internet service providers such as [redacted]. [redacted].”); *id.* at *6 n.16
 (“[A]ll ‘about’ communications”—that is, communications containing a “targeted selector”—“are
acquired by means of NSA’s acquisition of Internet transactions through its upstream collection.”).

1 of upstream collection, defendants “search the content of” intercepted Internet
2 communications for “targeted selectors”).

3 **b. Admissions in Congressional Testimony**

- 4 i. ECF No. 262 (7/25/14 Wiebe Decl.), Ex. D at 7 (12/8/11 Monaco/Inglis/Litt Joint
5 Statement) (“[U]pstream collection allows NSA to acquire, among other things,
6 communications about a target where the target itself is not a communicant. . . .
7 [A]lthough upstream collection only targets Internet communications that are not
8 between individuals located in the United States and are to, from, or about a tasked
9 account, there is some inevitable incidental collection of wholly domestic
communications or communication not to, from, or about a tasked account that could
contain U.S. person information. . . . [G]iven the volume of the upstream collection, the
FISC concluded that the actual number of such communications may be in the tens of
thousands annually.”).

10 **c. FISC Opinions**

- 11 i. ECF No. 254-1 at 8 (Corrected Defs. Reply Br. Re Preservation Orders) (quoting
12 10/3/11 FISC Opinion, 2011 WL 10945618, at *10, *27) (“NSA’s upstream collection
13 devices acquire any Internet transaction transiting the device if the transaction contains
14 a targeted selector anywhere within it, . . . that is, if the transaction contains a
communication that is to, from, or about the targeted selector.”).³

15 **d. Admissions in Government-Issued Reports**

- 16 i. ECF No. 262 (7/25/14 Wiebe Decl.), Ex. A at 7, 35–37 (PCLOB 702 Report (July 2,
17 2014)) (“To identify and acquire Internet transactions associated with the Section 702-
18 tasked selectors on the Internet backbone, Internet transactions are first filtered to
19 eliminate potential domestic transactions, and then are screened to capture only
20 transactions containing a tasked selector. Unless transactions pass both these screens,
21 they are not ingested into government databases. As of 2011, the NSA acquired
22 approximately 26.5 million Internet transactions a year as a result of upstream
collection. Upstream collection acquires Internet transactions that are “to,” “from,” or
“about” a tasked selector. . . . An “about” communication is one in which the tasked
selector is referenced within the acquired Internet transaction, but the target is not
necessarily a participant in the communication. If the NSA therefore applied its
targeting procedures to task email address “JohnTarget@example.com,” to Section 702
upstream collection, the NSA would potentially acquire communications routed through

23
24 ³ See also Memorandum Opinion (“10/3/11 FISC Opinion”), [Name and docket no. redacted], 2011
25 WL 10945618, at *5–*6 (FISC Oct. 3, 2011) (“NSA’s acquisition of Internet communications
26 through its upstream collection under Section 702 is accomplished by acquiring Internet
27 ‘transactions,’ which may contain a single, discrete communication, or multiple discrete
28 communications, including communications that are neither to, from, nor about targeted
facilities The government’s submissions make clear not only that NSA has been acquiring
Internet transactions since before the Court’s approval of the first Section 702 certification in 2008,
but also that NSA seeks to continue the collection of Internet transactions[.]”).

1 the Internet backbone that were sent from email address JohnTarget@example.com,
2 that were sent to JohnTarget@example.com, and communications that mentioned
3 JohnTarget@example.com in the body of the message.”) (footnotes omitted).

4 **3) Evidence That Plaintiffs’ Communications Have Been Obtained and Searched By The**
5 **Government (Along With the Communications of Millions of Others) As They Transit the**
6 **Internet Backbone Facilities of Service Providers Within the United States Via Its**
7 **Upstream Collections**

8 **a. Plaintiffs’ declarations showing that they use AT&T Internet services, including to**
9 **communication internationally**

- 10 i. ECF No. 263 at ¶¶ 2-8, 1:6–8:6 (7/15/14 Jewel Decl.);
11 ii. ECF No. 264 at ¶¶ 2-9, 1:5–2:4 (7/18/14 Knutzen Decl.);
12 iii. ECF No. 265 at ¶¶ 2-9, 1:6–2:4 (7/17/14 Walton Decl.).

13 **b. Evidence demonstrating that AT&T was an electronic communications service**
14 **provider that provided access to its Internet “backbone” facilities within the United**
15 **States starting in 2001**

16 **i. Government Reports**

- 17 (1) ECF No. 147 (7/2/13 Wiebe Decl), Ex. A at 27–29, 33–34 (Draft OIG Report
18 (March 29, 2009)) (describing in detail the NSA’s relationship with two
19 telecommunications companies, described as “Company A” and “Company B” in
20 the report, and observing that the NSA’s relationship with each company gives NSA
21 access to large volumes of communications “transiting the United States through
22 fiber-optic cables, gateway switches, and data networks”);
23 (2) ECF No. 262 (7/25/14 Wiebe Decl.), Ex. E at 29, fig. 9 (Common Carrier Bureau,
24 FCC, 1999 International Telecommunications Data (Dec. 2000)) (confirming that
25 AT&T and MCI/Worldcom (now Verizon) were the country’s two largest
26 international telephone call providers for the period charted).

27 **ii. AT&T’s admission that it performs FISA surveillance for the government**

- 28 (1) ECF No. 295 (10/24/14 Wiebe Decl.), Ex. B (AT&T 2014 Transparency Report).

iii. Percipient and expert witness testimony of Klein, Marcus, and Russell

(1) Percipient

- (a) ECF No. 85 and Exhibits (3/28/06 Klein Decl.);
(b) ECF No. 84-1 at ¶¶ 6, 10–12, 15, 19–23 (4/10/06 AT&T Managing Director-
Asset Protection James Russel Decl.) (authenticating statements and documents
in 3/28/06 Klein Declaration and 3/29/06 Marcus Decl.).

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(2) *Expert*

(a) ECF No. 89 at ¶¶ 38–147 and Exhibits (3/29/06 Marcus Decl.) (explaining (a) the functionality of the equipment and technology referenced in the 3/28/06 Klein Decl. and (b) that there is no plausible business purpose for AT&T’s surveillance configuration).

4) Evidence That the Government’s Collection of Communications From the Internet Backbone and Subsequent Searches Has Been Ongoing Since 2001

a. Admissions in Declarations in This Case

i. ECF No. 168 at ¶ 8, 5:8–15 (12/20/13 Clapper Decl.) (“Over time, the presidentially authorized activities transitioned to the authority of the FISA. The collection of communications content pursuant to presidential authorization ended in January 2007 when the U.S. Government transitioned TSP to the authority of FISA under orders of the Foreign Intelligence Surveillance Court (FISC). In August 2007, Congress enacted the Protect America Act (PAA) as a temporary measure. The PAA expired in February 2008 and was replaced by the FISA Amendments Act of 2008, which was enacted in 2008 and remains in effect today. Today, content collection is conducted pursuant to section 702 of FISA.”).

b. The Privacy and Civil Liberties Oversight Board’s (PCLOB) Report, explaining that NSA’s collection of communications data from the Internet backbone has continued from 2001 to today

i. ECF No. 310 (Plaintiffs’ Notice of Additional Authorities), Ex. A at 5–6, 16–20 (PCLOB 702 Report) (explaining that before 2007, the collection occurred under presidential authority, and that it has continued since then through the present, first under FISA, then under the Protect America Act, and now under Section 702 of the FISA Amendments Act: “[T]he government developed a statutory framework specifically designed to authorize this collection program. After the enactment and expiration of a temporary measure, the Protect America Act of 2007, Congress passed the FISA Amendments Act of 2008, which included the new Section 702 of FISA. The statute provides a procedural framework for the targeting of non-U.S. persons reasonably believed to be located outside the United States to acquire foreign intelligence information.”).

Dated: December 19, 2014

Respectfully submitted,

/s/ Cindy Cohn
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KURT OPSAHL
JAMES S. TYRE
MARK RUMOLD
ANDREW CROCKER
DAVID GREENE

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